(2)

No. 00-208

SUPREME COURT, U.S.
FILED
SEP - 6 2000
CLERK

IN THE

Supreme Court of the United States

CLAUDIA DEGENNARO,

Petitioner,

v.

ROBERT C. FURR, Chapter 7 Trustee,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

LESLIE S. OSBORNE
FURR AND COHEN, P.A.
Attorneys for Respondent
1499 West Palmetto Park Road
Suite 1499
Boca Raton, Florida 33486
(561) 395-0500

162017

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

28pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
A. The Federal District Court Proceedings	4
B. The 11th Circuit Decision on Appeal	5
Reasons for Denying the Writ	6
A. Petitioner's Argument is Contrary to the Undisputed Facts and Procedural Rules	6
B. Due Process Requirements Were Complied With	8
C. Alternative Methods of Service of Process Are Inapplicable	9
D. The 11th Circuits Decision in *Ponsoldt* Was Followed	10
E. Petitioner's Constitutional Rights Were Not Violated	10
Conclusion	10
Appendix — Excerpts From Transcript Of Motion To Vacate Final Judgment Denying Discharge Of Debtor Of The United States Bankruptcy Court For The Southern District Of Florida Dated October 30, 1996	1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Coggin v. Coggin, 30 F.3d 1443 (11th Cir. 1994) .. 4, 9

Hess v. Pawloski, 274 U.S. 352 (1927) 4, 9

Manufacturers Hanover Trust Company v. Ponsoldt, 51 F.3d 938 (11th Cir. 1995) 10

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 4, 8

Robinson v. Hanrahan, 93 S. Ct. 30 (1972) 8

Statutes:

11 U.S.C. § 727(a)(2)(B) 2

11 U.S.C. § 727(a)(3) 2

11 U.S.C. § 727(a)(4) 2

11 U.S.C. § 727(a)(5) 2

11 U.S.C. § 727(a)(6)(A) 2

11 U.S.C. § 727(a)(6)(C) 2

United States Constitution:

Fifth Amendment 10

Cited Authorities

Page

Rules:

Bankruptcy Rule of Civil Procedure 7004(b)(9) ..... *passim*

Bankruptcy Rule of Civil Procedure 7055 4

Bankruptcy Rule of Civil Procedure 9024 4

Federal Rules of Civil Procedure 55(c) 4

Federal Rules of Civil Procedure 60(b) 4

Other Authority:

Meeting of Creditors § 341 1

STATEMENT OF THE CASE

This case is based on a bankruptcy that was originally filed as a Chapter 11 in the Eastern District of New York to avoid a foreclosure sale scheduled for the next day. The Petitioner listed significant assets, ongoing businesses, and cash revenues and was afforded a privilege to be a Debtor-in-Possession.

In February, 1992, the bankruptcy court converted the bankruptcy to a Chapter 7, with the specific findings that the Petitioner had obstructed justice, failed to comply with the Debtor-in-Possession fiduciary obligations, and otherwise violated the requirements placed upon her as a Debtor-in-Possession. The case was transferred to the Southern District of Florida and Robert C. Furr was appointed the Chapter 7 Trustee in Bankruptcy.

Pursuant to the conversion and transfer, the Petitioner's § 341 Meeting of Creditors was scheduled for June 11, 1992. The Petitioner did not attend that meeting and the Trustee filed a motion requesting that the court order the Petitioner to appear at a second § 341 Meeting. The Court did grant such an Order and although the Petitioner did attend that § 341 Meeting on July 22, 1992, she refused to answer or respond to a single question posed by the Trustee. On April 30, 1992, the Court entered an Order commanding the turnover of books and records as well as the possession of two vehicles to the Trustee. None of those documents or vehicles were turned over. On July 5, 1992, the Bankruptcy Court entered an Order denying the Petitioner's motion for rehearing of the April 30, 1992, Order. This Order again required the Petitioner to turnover certain property and documents. The Petitioner never obeyed this Order.

On July 14, 1992, the Bankruptcy Court entered an Order commanding the turnover of rents from the Petitioner to the Trustee. The Petitioner failed to abide by that Court Order. On November 12, 1992, the Trustee filed an adversary complaint objecting to the Petitioner's discharge on numerous grounds, including the Petitioner's failure to abide by the previously entered Court Orders, and her failure to cooperate with the Trustee in the administration of the estate.

Of particular significance was Paragraph 13 of the Complaint wherein the Trustee alleged that despite repeated requests, the Petitioner refused to divulge to the Trustee her residence address as the Petitioner had moved from her original residence post-petition.

The Complaint filed in this case sought to deny Petitioner's discharge pursuant to 11 U.S.C. § 727(a)(3) (concealing books and records from which the debtor's financial condition might be ascertained), § 727(a)(4) (knowingly and fraudulently making a false oath), § 727(a)(2)(B) (transferring property post-petition with the intent to hinder, delay or defraud creditors), § 727(a)(5) (failure to explain loss of assets), § 727(a)(6)(A) (failure to obey a lawful order of the court), and § 727(a)(6)(C) (failure to respond to a material question or to testify other than a proper invocation of Fifth Amendment Privileges. The Complaint, Summons and Order Setting Filing and Disclosure Requirements for Pretrial and Trial were served pursuant to Bankruptcy Rules of Civil Procedure 7004(b)(9) by first class mail to the address contained in the Debtor's Schedules and pleadings, to wit: 4300 U.S. Highway #1, 203-329, Jupiter, FL 33477 (this was a rented mailbox at Mailboxes, Etc.). This was the address set forth by the Petitioner on her Amended Bankruptcy Schedules filed on

May 4, 1992. Pursuant to the Court Order on filing and disclosure requirements for pretrial and trial issued in the adversary proceeding, the parties were required to attend a pretrial conference. A pretrial conference was held on January 5, 1993, and due to the Petitioner's failure to appear, the Trustee made an *ore tenus* motion for default judgment.

On January 19, 1993, the Bankruptcy Court entered a Final Judgment Denying Discharge of Debtor for failure to file any responsive pleading in the adversary proceeding and the failure to attend the Court Ordered conference.

On June 4, 1996, three and a half years after the date of Default Judgment, the Petitioner filed a Motion to Vacate and Reverse the Final Judgment Denying Discharge of Debtor. An evidentiary hearing was held by the Bankruptcy Court on October 30, 1996. At that hearing, the Petitioner testified that she had closed the mailbox address at Mailboxes, Etc. no later than June of 1992. She was unable to explain, however, why as of at least July of 1992, while she was still filing pleadings with the Bankruptcy Court, she was using that same address. The Petitioner further testified that as of approximately June or July of 1992, she was having many personal problems and therefore stopped picking up her mail. Thus, even were the box not closed as she testified, she would not have received the pleading based upon her own actions.

The unrefuted testimony as well was that the Trustee's office did not receive the Complaint back in the mail from the closed Mailboxes, Etc. box until April 30, 1993. In addition, the Petitioner never changed her address with the Court as required by the Bankruptcy Code.

At the time of the hearing, the Court made factual findings beginning at Page 150 of the Transcript and continuing through Page 163 (see Appendix A). Broken down to its most basic elements, the Court found that: (a) proper service of process was obtained upon the Petitioner, Claudia Degennaro, at the address she listed in the Bankruptcy Schedules; (b) the Petitioner failed to show that the required elements of Federal Rules of Civil Procedure 55(c) made applicable in adversary proceedings by Bankruptcy Rule 7055 as well as the Federal Rules of Civil Procedure 60(b), made applicable to adversary proceedings pursuant to Bankruptcy Rule 9024, had been met. Specifically, (1) Petitioner failed as to the element of excusable neglect and that based upon the Petitioner's own testimony, she stopped checking her mail due to personal reasons; (2) Petitioner failed to act with due diligence as required by the Rules in waiting 41 months or 3 ½ years before filing her motion. The Petition for Writ of Certiorari fails to recognize these findings.

A. The Federal District Court Proceedings

The Petitioner appealed the Bankruptcy Court's findings to the United States District Court, Southern District of Florida. Contrary to the Petitioner's argument that "the District Court held that *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) did not apply to the [Petitioner's] case", the Court held that the Petitioner's argument pursuant to that case failed because the method of service was reasonably calculated to provide her with actual notice. The District Court further relied on the binding authority of *Coggin v. Coggin (In re Coggin)*, 30 F.2d 1443 (1450) (11th Cir. 1994) and *Hess v. Pawloski*, 274 U.S. 352 (1927) for the proposition that service of process was proper.

The Petitioner further argues that "the District Court held that the Trustee's mailing his summons and complaint to deny the Debtor's discharge to a knowingly closed post-office box was sufficient due process . . .". There are no findings by the District Court that the Trustee knew the post-office box was closed. In fact, at Footnote 4 of its Opinion, the District Court specifically held "it is unclear exactly when Appellant closed the post-office box and when Mailboxes, Etc. stopped accepting mail for Appellant. These ambiguities, however, are irrelevant because it is undisputed that Appellant did not provide the Court or the Trustee with a more current address."

The District Court further recognized that Federal Rule of Bankruptcy Procedure 7004(b)(9) explicitly provides for service by first class mail at the Petitioner's record address. The District Court further found that the bankruptcy trustee did in fact comply with this Rule, a Rule which was promulgated by this Court.

B. The 11th Circuit Decision on Appeal

The Trustee agrees with the statement set forth by the Petitioner under the caption "11th Circuit Decision on Appeal".

REASONS FOR DENYING THE WRIT

The Petitioner raises five (5) arguments in her Petition for Writ of Certiorari as to why this Court should exercise jurisdiction over this case. Each argument will be addressed in the order of appearance in the initial Petition.

A. Petitioner's Argument is Contrary to the Undisputed Facts and Procedural Rules

Petitioner's argument under Section A is two-fold. First, that the Trustee should have been obligated to look through every document in the file to attempt to determine a better address, and secondly, the service of process statutes refer to "usual place of abode" and "individual dwelling house", thus requiring service to be made at one of those two places.

As to the first argument, the Court properly determined that the Bankruptcy Code *requires* the Trustee to make service of process at the address which the Debtor lists as her address on the bankruptcy Schedules. In the instant case, the Debtor filed amended schedules changing her address to the post-office box with Mailboxes, Etc. Trustee also made as part of his complaint, an allegation that Debtor refused to give the Trustee her accurate residence address.

None of these facts were disputed at the time of the initial hearing other than the Debtor arguing that the Trustee should have tried to find a better address. Bankruptcy Rule of Civil Procedure 7004(b)(9) specifically requires the Trustee to make service at the address listed by the Debtor in her schedules. This is what the Trustee did. The Trustee had no reason to believe this was an inaccurate address and fully complied with the Rules. It is also important to note that the

Debtor herself testified that she stopped picking up her mail due to personal reasons and this was a large factor in the Court's determination that any failure by the Debtor to receive service of process was due to her own actions.

As to the second part of the argument, while it is true that certain sections in the service of process statutes, whether federal, state or bankruptcy, do refer to the "usual place of abode" or "individual dwelling house", the statute upon which the Trustee served states

> . . . service may be made within the United States by first class mail postage prepaid as follows: . . . Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorneys at the attorney's post-office address.

BRCP 7004(b)(9).

In the instant case, the Debtor was not represented by an attorney and listed on her amended schedules the Mailboxes, Etc. post-office box. The issues raised by the Debtor were considered by the Court and rejected as the Trustee had fully complied with Rule 7004(b)(9) of the Bankruptcy Rules of Civil Procedure as promulgated by this Court.

B. Due Process Requirements Were Complied With

Petitioner next argues that the 11th Circuit's decision is inconsistent with the meaning and import of this Court's decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Robinson v. Hanrahan*. A review of these cases, however, shows that the Debtor's argument is misplaced. *Mulane v. Central Hanover Bank & Trust* actually supports the Trustee's position. The Court therein held that the requirement of due process is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections. "But if with due regard to the practicalities and peculiarities of the case, these conditions are reasonably met, constitutional requirements are satisfied. . . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." In the instant case, the Petitioner elected to file bankruptcy. Petitioner elected to bring herself under the jurisdiction of the bankruptcy court and subject to the Bankruptcy Rules. The Petitioner then elected to ignore those Rules, not pick up her mail, disregard court orders, and refuse to give her residence address to any party involved in the case. The Bankruptcy Rules do provide a reasonable method for providing notice of a proceeding to a debtor who has elected to be in the bankruptcy court. As such, the standards set forth under *Robinson v. Hanrahan* have been met.

In addition, in *Robinson v. Hanrahan*, 93 S. Ct. 30 (1972), the Court once again had noted that due process requires notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their

objections. The Petitioner then argues that the Trustee knew the Debtor's home address and knew that the post-office box had been closed. The evidence before the bankruptcy court was to the contrary. The unrefuted evidence was that the Trustee did not know the Debtor's home address and was unaware of the closure of the post-office box. In fact, both the Bankruptcy Court and District Court noted that it was unclear when the box was actually closed as the Debtor's actions in using the post-office box for a mailing address on pleadings was contrary to her testimony that the box had already been closed. Thus, the Bankruptcy Court, District Court and 11th Circuit Court of Appeals properly relied on *Coggin v. Coggin*, 30 F.3d 1443 (11th Cir. 1994) and *Hess v. Pawloski*, 274 U.S. 352 (1927) and Bankruptcy Rules of Procedure 7004(b)(9) in determining that the due process standards in this case had been met.

C. Alternative Methods of Service of Process Are Inapplicable

Debtor next argues that Bankruptcy Court, District Court and 11th Circuit Court of Appeals did not address the Debtor's issues of whether other Rules on service of process applied. To the contrary, the Bankruptcy Court specifically addressed whether other Rules applied and found that the Trustee only needed to comply with Bankruptcy Rule of Procedure 7004(b)(9) which was done. All other arguments that other rules for service of process might have been followed are irrelevant. The requirements of due process were met by compliance with Bankruptcy Rule 7004(b)(9).

D. The 11th Circuits Decision in *Ponsoldt* Was Followed

Petitioner next argues that the 11th Circuit failed to apply its own prior decision in *Manufacturers Hanover Trust Company v. Ponsoldt*, 51 F.3d 938 (11th Cir. 1995). *Ponsoldt* does not support the Debtor's position. *Ponsoldt* stood for the proposition that where there are multiple methods for service of process under the law, the compliance with any one of those methods will suffice for due process purposes. As the Trustee complied with Bankruptcy Rule of Procedure 7004(b)(9), the *Ponsoldt* decision supports denial of this Petition.

E. Petitioner's Constitutional Rights Were Not Violated

The Petitioner's last argument contains no argument, but was rather merely a statement that the Debtor's constitutional rights under the Fifth Amendment of the United States Constitution had been violated. As previously shown, the due process requirements of the United States Constitution have been met and the Petition must be denied.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

LESLIE S. OSBORNE
FURR AND COHEN, P.A.
Attorneys for Respondent
1499 West Palmetto Park Road
Suite 1499
Boca Raton, Florida 33486
(561) 395-0500

APPENDIX

APPENDIX — EXCERPTS FROM TRANSCRIPT OF MOTION TO VACATE FINAL JUDGMENT DENYING DISCHARGE OF DEBTOR OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED OCTOBER 30, 1996

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Robert A. Mark

CASE NO. 92-30350
-BKC-RAM

ADV. NO. 92-1181
-BKC-RAM

In the Matter of:

CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Debtors.

ROBERT C. FURR, Trustee,

Plaintiff,

v.

CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Defendants.

Appendix

MOTION TO VACATE FINAL JUDGMENT DENYING DISCHARGE OF DEBTOR (CLAUDIA DEGENNARO), MOTION TO VACATE FINAL JUDGMENT DENYING DISCHARGE OF DEBTOR (ANTHONY DEGENNARO)

October 30, 1996

The above-entitled cause came on for Hearing, before the HONORABLE ROBERT A. MARK, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, 701 Clematis Street, West Palm Beach, Palm Beach County, Florida, at a session of said Court commencing at 10:30 a.m. on Wednesday, October 30, 1996, and the following proceedings were had:

* * *

[150] Port St. Lucia.

THE COURT: Okay. You have never affirmatively done anything in the bankruptcy to indicate where you were, or to otherwise seek relief or status or anything else from the end of '92 until sometime in '96?

MS. DEGENNARO: It would have been '95 that I had gotten back involved with the bankruptcy. When I saw something was being done wrong, that's when I started — decided to jump in and do something about something being done wrong.

THE COURT: Okay.

All right. We're going to have to wrap this up for today. I'm going to reserve on Mr. DeGennaro's motion until I have a chance to look at the memo that Mr. Ader has filed.

You're in Miami, correct?

MR. ADER: That's correct.

THE COURT: So if we need to have further argument as to whether or not to reopen the evidence, we can certainly do that in Miami with Mr. Osborne by phone, and if Mr. Goldstein and Mr. Markowitz want to participate, they are in Miami.

As to Mrs. DeGennaro's motion, I'm prepared to rule. The matter before the Court is the Debtor [151] Claudia DeGennaro's Motion to Vacate and Reverse Final Judgment Denying Discharge, filed on June 4, 1996, and an amendment to the motion that was filed on July 24, 1996.

The Court initially conducted a hearing on the motion in which certain documents were referenced, but it was not an evidentiary hearing, in that the Court did not at that point in time mark exhibits and take them into evidence. That hearing, which we will consider a preliminary, non-evidentiary hearing, took place on July 25, 1996. At the conclusion of that, I determined that we should set this for a full evidentiary hearing, allow time for discovery, and proceeded today with the evidentiary hearing in Palm Beach.

I've considered the exhibits introduced by Mrs. DeGennaro and by the trustee, the testimony of Mrs. DeGennaro and the trustee, Robert Furr, and the law applicable, as well as other items in the record that the Court can take judicial notice of from the bankruptcy case, as well as the prior pleadings in the adversary proceeding.

This is Adversary Proceeding 92-1181. The findings and conclusions of the Court in this contested matter are going to be put on the record and [152] will be the findings and conclusions required under Rule 7052 of the Federal Rules of Bankruptcy Procedure.

The background facts will not all be put into the record in terms of all of the dates, but in approximately February 1992, this bankruptcy case was transferred from the Southern — or Eastern District of Now York at or about the same time that it was converted to a Chapter 7. Robert Furr, the trustee, was appointed in this case and commenced the duties of a trustee.

The adversary complaint at issue was filed in November 1993. The summons and notice of trial was served by first-class mail on the debtor, Claudia DeGennaro, at the address, 4300 U.S. Highway No. 1, Suite 203-329, Jupiter, Florida 33477. One of the major issues brought by the debtor in her motion to vacate is a challenge to the adequacy of service of process based upon the fact that she was no longer, as she testified, getting mail at that address and that the trustee had notice of a more current address of the debtor.

I would note, by the way, that from the debtor's own testimony, it's unclear during the period of time when this summons was served, whether she was [153] still living at the address on Urdea Road or whether she had already moved to Palm City. The address that the complaint was served on is a mailbox address, equivalent to a post office box, although at a private entity.

The last exhibit by the debtor indicates that this was — Actually this is the application to the U.S. Post office indicating that the delivery is to be to Mailboxes Et Cetera, which is the private mailbox service located at the address indicated, 4300 U.S. Highway No. 1 in Jupiter.

The Court finds that service was properly effected under the rules. 7004(b)(9) specifically relates to service of process on a debtor — Sorry for the delays. I don't have my usual tools, in terms of my own code books and so forth, in front of me — The applicable rule is 7004(b)(9), which specifically says that you serve a debtor after a petition has been filed and until the case is dismissed or closed by:

> "Mailing copies of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing, and if the debtor is represented by an attorney, to the attorney at the attorney's post [154] office address."

This rule has to be interpreted in light of this case having started in New York and being transferred to Miami, and thereafter using the address by the debtor in the Miami case

as the address of record, and I find that the 4300 U.S. 1 address was the address of record, the address of the debtor, designated by the debtor, for purposes of Rule 7004(b)(9), and there is no affirmative filing by the debtor in the bankruptcy case or affirmative notice by the debtor to the trustee to utilize a different address. The various exhibits that have been introduced by the trustee show that through, at least, July of 1996, the debtor was signing pleadings and receiving mail at the post office mailbox address.

The most significant thing I find in terms of service or process, which I referred to in my questioning of Mrs. DeGennaro, is that this in not a home address. It's a mailbox address, and her defense relies on the allegation that she had actually moved sometime in May to Bamboo Lane, and then had moved again sometime in July to Urdea Road, and then moved again sometime in November to Palm City, and simply put, so what?

The debtor's mailing address as of record [155] was a mailbox. There was never notice of what her actual residence address was given to the trustee, nor was there any effort by the debtor to have a forwarding address, where the trustee at one point in time, through phone conversations and a note from an attorney for a landlord, had the Bamboo Lane address. Somewhat ironically the attorney for that creditor initially used the wrong address for the client, who he was representing in the property that he was seeking stay relief to evict the debtor from, which was, in fact, the Urdea Road address.

Appendix

There are some documents in the file, no doubt, that show that the trustee had pleadings and letters that showed that this creditor was seeking to evict from Urdea Road, but I don't find that to be significant in assessing the adequacy of service. The trustee was not obligated to diligently look through everything that was filed or to take note of everything that was filed in order to determine a home address.

Very significant to me was that the debtor, while producing evidence that this post office box may have been opened for some limited time, that the trustee — Let me finish that sentence. While producing evidence that the post office box may have [156] been opened for only a limited time, the debtor simply stopped checking the mailbox, apparently after June, even though she was still using that address in July in pleadings to the Court, and simply chose not to pick up mail there. There is no evidence that Mailboxes Et Cetera evicted her from the mailbox and no longer accepted mail at that location. Instead, the unconverted evidence is that it wasn't until April of 1993, Trustee's Exhibit 13 and its subparts, that all of this mail was returned, apparently, according to Mailboxes Et Cetera representative, because the debtor had simply stopped picking up the mail.

I am not cold-hearted or unsympathetic to the debtor's personal situation during this period of time. The record certainly supports the statements by the debtor as to what she was going through in terms of trying to deal with her personal problems, and I think Ms. DeGennaro, not necessarily in her self-interest on the legal issues here, but was very candid when she said she couldn't have handled any of the business and legal problems at the time. She was

doing her best to stay above water and handle her domestic matters, and that was her candid explanation for why she just didn't even pick up mail that may have involved business or legal matters in that period [157] of time, in the second half or late '92 and into 1993.

In short, there is simply no evidence that would demonstrate that the trustee had actual knowledge of a new address sufficient to require service at some other address, other than the address that the debtor used, and in fact, that even with knowledge, constructive knowledge, in the record of some other addresses, that the trustee was under no obligation to utilize another address in attempting service.

The adequacy of service — To the extent I may be just recharacterizing or redundant, I apologize. Adequacy of service is further supported by the evidence that Mrs. DeGennaro, had she gone to the mailbox, in all likelihood would have received the summons. That is that notwithstanding the implications at the earlier hearing that she moved and the trustee knew of and didn't use her new address, what it now appears is that she lived at various places during a point in time in which she was using a mailbox for business and legal matters and just simply decided at some point to stop picking up the mail there. In other words, that was still, as far as I can tell from the evidence, a good and valid address, not simply the address of record that the trustee [158] used, but an address that was where the debtor could and would have still received mail had she chosen to.

Again, even if the trustee had notice of Urdea Road, there is no indication that Ms. DeGennaro was necessarily still at

Urdea Road at the time that the complaint was mailed, nor certainly there at the time of the additional notices that she claimed she was entitled to.

I will make brief mention that normal procedure that we employ and put in the pretrial requirements is that if the plaintiff wants to avoid coming to a pretrial conference, you need to move for a default and default judgment. You can show up at the pretrial conference though, and if the defendant hasn't responded and the defendant isn't there, I will entertain, as I did in this case, an ore tenus motion for default judgment, and if there is no matters that require specific proof, the judgment will be entered upon submission by the plaintiff, and that is what happened here.

In sum then, I find that service was effected in accordance with 7004(b)(9). The debtor did not, as she was required to do under the rules, notify the trustee of any change of address where mail should have been sent, as required by Bankruptcy Rule [159] 4002(5).

The service proper or the standard to set aside a default is virtually unmeetable given the facts of this case, and while I'm not reaching the meritorious defense issue, because of the length of time that was available today, Ms. DeGennaro has had an opportunity to show the other elements for setting aside a default judgment, excusable neglect and reasonable diligence. Frankly, while I'm not going to parse this in detail, it would appear to me under Rule 60 — Let me back up. It would appear that the rule predicate for this would be Rule 55(c) of the Federal Rules of Civil Procedure applicable in an adversary proceeding by virtue of Bankruptcy Rule 7055, which says:

Appendix

> "For good cause shown, the court may set aside an entry of default, and if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

If you look at Rule 60(b), 60(b) includes relief from a judgment for, (1), mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time and for reasons (1), (2), and (3) of 60(b), not more than one year after the judgment or proceeding was entered or [160] taken. So it would appear on the face of the rule that there is one-year limitation for relief from judgment for excusable neglect, and that it's not even a matter of evidentiary interpretation.

However, if we look at the catchall phrase, which certainly can be, arguably, applied in any instance at any time, and that is 60(b)(6), says: "Any other reason justifying relief from the operation of the judgment," that still says the motion shall be made within a reasonable time. I don't find the time to be reasonable. I understand that in the context of Ms. DeGennaro's life and priorities, it was reasonable for her to go about her life and restart her life as best she could, and it may have appeared to be in reasonable time once she got back involved in the bankruptcy case in 1995, but there is no way to plug in her personal problems into the conduct of a Chapter 7 case and say that a debtor can choose to essentially withdraw from participation in a bankruptcy for over two years, and then come back in and claim that there is reasonable diligence and acting within a reasonable period of time to seek relief, so I don't find that the debtor has satisfied the reasonable diligence or seeking relief within a

reasonable time under 60(b)(6), even if 60(b)(6) could be used as a possible [161] grounds for relief.

To the extent excusable neglect is argued as an element, given the debtor's testimony, while in some broader philosophical sense, and I'm not sitting in moral judgment, I could understand and excuse why the debtor chose to make her decisions that she did in 1992, but legally for excusable neglect in the context of not staying on top of business and legal matters, by not picking up mail and not participating in the case, it just isn't there, so I find for the reasons stated that the debtor was properly served, that the debtor has not demonstrated excusable neglect and that the debtor has not acted within a reasonable time to seek relief under Rule 55 and Rule 60 of the Civil Procedure Rules as applicable in this adversary proceeding.

So for those reasons, which will be incorporated by reference in a short order to be submitted by the trustee, the motion by Mrs. DeGennaro to vacate the default judgment is denied.

I'm going to ask Mr. Furr or Mr. Osborne to simply submit an order setting a status conference as to Mr. DeGennaro. By the time I get the order, that will trigger my decision as to whether we do need or don't need the status conference. If I don't set a [162] status conference, I will enter some other type of order or set a further hearing just to announce a ruling, but rather than leaving it open-ended, if I don't get a chance to look at it between now and receiving that order in a few days, I will just set it for further hearing in Miami. Absent any further direction by the Court, it will be a non-evidentiary status conference.

I don't have further time today and with the late submission of the memo, it doesn't permit sufficient review by the Court or the other side to argue those issues today. The 17(c) issue, the competency issue, in that context I believe is somewhat new to the Court and the other parties to the proceeding.

I apologize to the Talmo folks for the delay, but it seemed sensible to me to spend a little more time to finish one, rather than leaving both open, and I'm afraid we might not have had time, even if we started an hour ago to finish Talmo.

We will take about a ten minute recess, and at the beginning of the Talmo case, I will come back and I want to address the legal standards the parties believe are applicable and hear, not an opening statement, but a summary of who the witnesses are, and [163] we'll decide, if we're going to go an hour or two, which witnesses it makes most sense to take care of, assuming we may wind up continuing the hearing in Miami, rather than back up here, so about ten minutes for Talmo.

Before we recess, any questions on DeGennaro?

MR. OSBORNE: Yes, your Honor. May I have the opportunity to respond by memo on the 17(c) issue? I've never really looked at this issue, if I might respond in three or four days and submit a memo?

THE COURT: Yes. Put a line in the order setting a status conference that any supplemental pleadings by any of the parties can be filed, and let's leave a date blank, and we will do it that way.

MR. OSBORNE: Thank you, your Honor.

THE COURT: Okay. Thank you.

(Whereupon, the hearing was concluded.)

* * * *